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# **YEARWORTH v. NORTH BRISTOL NHS TRUST: A PROPERTY/MEDICAL CASE OF UNCERTAIN SIGNIFICANCE?**

Shawn H.E. Harmon<sup>▲</sup>

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**Abstract:** It has long been the position in law that, subject to some minor but important exceptions, property cannot be held in the human body, whether living or dead. In the recent case of *Yearworth and Others v North Bristol NHS Trust*, however, the Court of Appeal for England and Wales revisited the property debate and threw into doubt a number of doctrines with respect to property and the body. This brief article analyses *Yearworth*, (1) reviewing the facts and the Court's decision with respect to the originators' proprietary and contractual interests in their body and bodily products, (2) considering the significance of relying on property and its use a legal metaphor, (3) questioning the scope of the property right created, and (4) querying whether an alternate conceptual approach to extending rights and a remedy was warranted. It concludes that, while *Yearworth* engages with, and impacts on, important theoretical and practical issues – from legal, healthcare and research perspectives – it does not offer a great deal of guidance and, for that reason, its precedential significance is in doubt.

**Keywords:** medicine and healthcare – law – property – body tissues and products – negligence

## **INTRODUCTION**

It has long been the position (in law) that property cannot be held in the undivided human body, whether living or dead.<sup>1</sup> In the UK, this orthodox view was expounded in the seventeenth century,<sup>2</sup> and reiterated thereafter in *R v Lynn* (1788), *R v Sharpe* (1857), *Foster v Dodd* (1867), *R v Price* (1884), and *Williams v Williams* (1881-85). More recently, in *R. v Bentham* (2005), the House of Lords held that a person does not 'possess' his body or any part of it.<sup>3</sup> This prohibition has also largely obtained with

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<sup>▲</sup> Research Fellow, INNOGEN, ESRC Centre for Social and Economic Research on Innovation in Genomics, University of Edinburgh, and SCRIPT, AHRC Centre for Research on Intellectual Property and Technology Law, University of Edinburgh.

<sup>1</sup> With respect to living bodies, see Matthews (1982), who noted that interference with a living body is an invasion of a personal (not a proprietary) right. With respect to dead bodies, see *Haynes Case* (1614), 77 ER 1389, and Sir Edward Coke, *Institutes of the Laws of England* (1641), 3-203, who stated, "The burial of the cadaver (that is *caro data vermibus*) is *nullius in bonis*."

<sup>2</sup> Though see Mason and Laurie (2001), who suggest that it derives from a misinterpretation of precedent.

<sup>3</sup> One should note that this was a criminal case concerned with whether the defendant had 'possession' of a weapon, in this case his hand inside his jacket pocket and held to look as if it was a firearm. The (only) relevant statement comes from Lord Bingham, who, at para. 8, stated: "... One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it. Resort to metaphor is impermissible because metaphor is a literary device which draftsmen of criminal statutes do not employ. What is possessed must under the definition be a thing. A person's hand or fingers are not a thing. If they were regarded

respect to excised body parts (Skegg, 1975), though in *Doodeward v Spence* (1908), the High Court of Australia recognised third party ownership in a preserved foetus, holding that the lawful exercise of skill which gave the foetus attributes different from a mere corpse founded a right to proprietary possession. This ‘attribution of skill’ exception found its way to the UK in *R v Kelly* (1998), wherein the Court of Appeal recognised property rights in excised body parts where they had been subjected to dissection or preservation, or had otherwise acquired different attributes by the application of skill.<sup>4</sup> In the recent case of *Yearworth and Others v North Bristol NHS Trust* (2009), the Court of Appeal for England and Wales revisited the property issue. This article analyses *Yearworth*, (1) reviewing the facts and the Court’s decision with respect to the originators’ proprietary interests in their body and bodily products, (2) considering the significance of relying on property and its use as a legal metaphor, (3) questioning the scope of the property right created, and (4) querying whether an alternate conceptual approach to extending rights and a remedy was warranted. It concludes by considering the precedential value of *Yearworth*.

## BACKGROUND AND DECISION

In *Yearworth*, six claimants were diagnosed with cancer and consented to chemotherapy at the Southmead Hospital. As the treatment had the possibility of rendering them infertile, the hospital, which operated a fertility clinic licensed under the *Human Fertilisation and Embryology Act 1990* (HFEA 1990), offered to freeze and store samples of each claimant’s semen for his subsequent use. Each claimant agreed and produced a sample. The agreement resulted in the generation of a Sperm Storage Request, a Consent to Storage and Use, and a Sperm Storage for Those Undergoing Chemotherapy for each claimant, which contained a variety of representations, including some relating to storage and future use. Following completion of the documents, and prior to the use of the sperm, the storage system failed, causing the samples to be irreversibly damaged.

Each claimant alleged that he suffered an adverse or traumatic reaction to the news, including mental distress or mild/moderate depression. The defendant Trust admitted that it had a duty to take reasonable care of the sperm and that it had failed to do so by neglecting to top up the liquid nitrogen tanks when it knew or ought to have known that they required attention. However, it denied liability, arguing that, even if its breach caused injury or distress, the claimants were barred from recovery because the loss of sperm was neither a ‘personal injury’ nor ‘damage to property’.

In the appeal proceedings, the claimants advanced three arguments, namely that, due to the Trust’s negligence, they suffered (1) tortious personal injuries, (2) tortious damage to property, and (3) losses resulting from breach of bailment conditions.<sup>5</sup> The decision of the Court was given by Lord Judge CJ (Sir Anthony Clarke MR and Wilson LJ concurring).

On the personal injury claim, the claimants argued that (1) the sperm had been inside their bodies, (2) damage to it while inside them would constitute a personal injury, (3) its ejaculation makes no difference given that it was *not* intended to be abandoned and it *was* intended to retain its original biological function and purpose

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as property for purposes of s. 143 of the 2000 Act, the Court could, theoretically, make an order depriving the offender of his rights to them, and they could be taken into the possession of the police.”

<sup>4</sup> This approach was more recently applied in *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

<sup>5</sup> This last claim was argued for the first time in, and at the invitation of, the Court of Appeal.

(ie: to fertilise a human egg). In support of their position, they cited a German case which held that bodily parts, including eggs extracted for re-implantation, retained a functional unity with the body such that injury to them could constitute physical injury, and, although stored sperm would not be re-implanted, it would be illogical for the law to treat damage to it differently.

Lord Judge CJ noted the practical legal constraints which compelled the German court to adopt this view (para. 22) and dismissed the personal injury claim perfunctorily (para. 23), stating:

23 [I]t would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or "personal injury" to him. ... We must deal in realities. To do otherwise would generate paradoxes, and yield ramifications, productive of substantial uncertainty, expensive debate and nice distinctions in an area of law which should be simple, and the principles clear. Even if we were to admit [the claimants' argument], the law would swim into deep waters in relation to the continued biological activity, and the function, of several other bodily substances or parts.

Ultimately, Lord Judge CJ was not convinced that damage to an excised part or product – which could no longer be felt – could be characterised as a 'personal injury to the body', and he seemed concerned with the complexity and uncertainty to which a personal injury basis would give rise.

On the issue of a property right in the sperm, Lord Judge CJ opined that a claim for negligent loss of property must be founded on legal ownership or possessory title retained by the claimant. Importantly, and drawing on Rose LJ's opinion in *Kelly*, Lord Judge CJ explicitly stated that advances in medical science are demanding a re-analysis of the common law's approach to ownership of parts and products of living bodies, and he rejected the suggestion that the *Human Tissue Act 2004* (HTA 2004) could be used to confine the common law's treatment of body parts or products as property if the common law rested on a broader basis (para. 38).<sup>6</sup> He later stated:

45(d) ... [W]e are not content to see the common law in this area founded upon the principle in *Doodeward*, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. Moreover, a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. ...

While Lord Judge CJ took notice of the HTA 2004, which, in s. 32(9), entrenches the *Doodeward* 'application of skill' exception to holding property, he pointed out that it was only peripherally relevant because gametes, which, according to s. 53(1), are governed by the *Human Fertilisation and Embryology Act 1990* (HFEA 1990), were in issue.<sup>7</sup> As such, he considered the respective positions of the parties under the

<sup>6</sup> In *L v Human Fertilisation and Embryology Authority and Secretary of State for Health* [2008] EWHC 2149 (Fam), the Court also stipulated that the common law 'does not stand still'.

<sup>7</sup> At the time of the case, the 2008 amendments to the HFEA 1990 were not yet in force, but none of the amendments would have had any bearing on the case.

HFEA 1990:

- The claimants' alone, through their bodies, generated the sperm, and the sole object of the sperm (and its storage) was for the claimants' subsequent use to reproduce (para. 45(f)).
- The HFEA 1990 was designed to give legal effect to principles of good practice in modern reproductive medicine, and should not deprive individuals of the ability to recover damages for breach of a statutory duty (para. 41).
- One of the pillars of the HFEA 1990 is the stringent requirements around informed consent, which make clear that only the claimants have *rights* in relation to the sperm, and the Trust has *duties* and *limitations* (para. 44).
- The interjection of the need for third party support (eg: expert storage and medical assistance to make subsequent use of the sperm) does not diminish a right held by an individual (para. 45(f)).

Noting that the Trust's actions precluded the claimants from exercising their right, Lord Judge CJ held that the claimants had ownership rights in their sperm and could sue for interference with those rights.

Having found that the control the claimants could exercise over their stored sperm was sufficient to found a property interest, Lord Judge CJ went on to consider bailment, which arises from taking temporary possession of another's goods, and involves an assumption of responsibility for their safe-keeping and return. Under the circumstances, in paras. 48 and 49, Lord Judge CJ held as follows:

- The Trust voluntarily chose to take possession of the sperm, and, though it received public funds to support such activities, its bailment was gratuitous insofar as the claimants were concerned.
- The Trust acquired exclusive possession of the sperm, and, having accepted that possession, undertook certain duties in relation thereto, including careful storage.
- The Trust held itself out as having special skills, and, by its own admission, failed to employ them appropriately when it allowed the nitrogen levels in the storage tank to drop and the storage temperatures to rise.

Lord Judge CJ concluded that a gratuitous bailment existed, and that, in addition to being liable under tort for damage to property, the Trust was liable under bailment.

On the issue of damages for psychological injury, Lord Judge CJ directed that each claimant would have to demonstrate that his distress or psychiatric injury was a reasonably foreseeable consequence of the breach of duty, whether the duty was considered under tort or bailment (para. 54). He concluded that, while the bailments in question were not commercial, they were certainly directed at offering the claimants peace of mind with respect to the potential to have children in the future where their reproductive capacity was under threat. As such, the claimants could

recover damages if they could prove (1) the foreseeability of mental distress, and (2) mental distress in fact.<sup>8</sup>

These, then, are the facts and *ratio* of the case. But what of the value of this decision and what does it really mean for practitioners in the medical law context? It is to this question that we turn in the following sections, first addressing the use of property as a remedy-grounding concept, before looking at the possibility of alternative foundations for protecting the rights and interests of tissue originators.

## PROPERTY AS METAPHOR?

Ironically, one is left wondering what the language of property in *Yearworth* means for those operating in the biomedical setting and the law relating to human bodies, tissues and products. There is very little work in the decision linking the claims to the concept of property, and, as shall be addressed below, little more directed at elucidating the scope of the rights erected. On the first issue, one wonders whether the language of property in *Yearworth* is simply being used as a metaphor?<sup>9</sup> It would seem so from Lord Judge CJ's comment at paragraph 28:

The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things.

However, he never grounds his use of property by clearly articulating the collection of rights envisioned or the basis of the extension of rights to the claimants (other than that they alone produced the sperm). As such, it is never made exactly clear what property is a metaphor for. Is it simply a means of extending some level of *control* to actors, including originators of tissue, in the new bio-economy? Given that most people are familiar with the idea of property, broadly conceptualised, and with the language of property, is it a means of offering *predictability* in a novel and highly fluid setting? Or is it simply a pragmatic means of securing *justice*, of providing a remedy, that has been denied to so many tissue originators in the past?

Lord Judge CJ considers both common law precedents and statutory provisions, rejecting and relying on both in turns. In the end, the rights granted under the HFEA 1990, particularly those around consent, seemed persuasive. So perhaps the decision and the use of property is really a metaphor for 'control', but again, one cannot be sure. The single short reference to Honoré cites one of the eleven incidents of ownership (eg: the right to use) but fails to explore these incidents in any systematic way. Even accepting the reference to Honoré, Lord Judge CJ failed to ground his finding of property in any particular moral theory or value, nor did he engage meaningfully with the very rich and important bioethical and legal scholarship on the subject of property in the human body. Additionally, he made no broad statement of principle other than that the common law must keep pace with medical science. His most telling statement is the following:

28 We have no doubt that, in deciding whether sperm is capable of being owned for the purpose which we have identified [future

<sup>8</sup> It should be noted that it is not clear from the case whether the claimant must demonstrate the manifestation of a psychiatric injury, as is the case in tort.

<sup>9</sup> Recall that, quite simply, metaphors allow us to understand and experience one kind of thing in terms of another (Lakoff and Johnson, 1980).

functional or reproductive use], part of our inquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here, the right, albeit limited, of the men to use the sperm) and the nature of the damage consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).

As such, after reviewing the development of the common law in relation to living bodies, corpses, parts of corpses, and parts and products of living bodies, he concluded that the claimants alone generated the sperm for the sole purpose of using it for their own benefit, and by virtue of the HFEA 1990, the claimants alone could order the destruction of the sperm (para. 45).

At this point, it is worth stating that an inquiry into the metaphor used or intended is not a matter of mere academic concern. On the issue of metaphors, it has been claimed that:

... [M]etaphor is but an aesthetically pleasing way of communicating meaning that could have been expressed literally. Metaphor set forth by the comparison view is not that metaphor is strictly equivalent to a literal expression, but that there is an analogical relation between the two parts of the metaphor, i.e. metaphor is an implicit simile (Caenave, 1979, p. 20).

However, there is a strong argument that metaphors are much more powerful; they are not mere comparative tools. This approach views the metaphor as having cognitive value by inextricably intertwining with the legal subject:

... The system of commonplaces or implications attending the subsiding subject fosters insight into the principal subject by demanding simultaneous awareness of both subjects that is not reducible to any mere comparison between the two (Murray, 1975, p. 288).

In short, the metaphor carries the observer beyond the original subject, contributing to the subject in a substantive way.

Given the decision in *Yearworth*, the human person – the originator of tissue and bodily products – is pulled into the property matrix. Obviously, there is a certain utility associated with the use of property because of the social familiarity we have with it. However, there is also a lot of (negative) baggage associated with the property paradigm which then gets associated with (or heaped onto) the person. In particular, its intimacy with materiality, markets, and financial-over-social merit makes its extension to the body controversial; the nature of its development creates a tendency to instrumentalise, and that is something we generally deplore when it comes to the person and the human body.<sup>10</sup> Given the controversial nature of the property metaphor, it was incumbent on the Court to offer some clarity around what

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<sup>10</sup> In this regard, see Campbell (2009), who, in ch. 2, argues that the property paradigm is dehumanising.

questions the use of this metaphor answers and evades (ie: what is the scope of the right being created).

## SCOPE OF THE PROPERTY RIGHT?

Of the many practical questions that remain unanswered by *Yearworth*, perhaps the most crucial one, again ironically and as noted above, relates to the nature and scope of the property right purported to be created. Because it is not clear what work the property paradigm is being asked to fulfil, it is not clear what bundle of property rights might have been extended to originators by this decision, nor is the range of the circumstances covered by the decision apparent. What if no documents amounting to gratuitous bailment had been involved? What of the situation where the institution is not licensed under the HFEA? What other rights does the claimant have with respect to the tissue other than return for his own agreed functional use? How far does the case and its finding of property go?

Given the above, including the unresolved foundations and purpose of the property finding, we are left to wonder whether the finding of property sounding in a cause of action is restricted to gametes and reproductive tissue, or, less restrictively, to body products for which there exist written agreements and duties the breach of which correlates to the originator's intended use, or, more expansively, is applicable to tissue originators and actors in the biomedical law setting more generally. Alternatively, might *Yearworth* have wider implications than to the medical law setting, and be transformative of tort and contract law more generally as it relates to claims made by individuals in relation to their bodies and their parts and products?

While it might be unfair to pose these questions at this early stage, one might expect to discern some indication of the case's intended scope from the language of the decision itself. Unfortunately, as lamented above, no great statements of principle were made or defended, and no great clarity emerges as to the intended scope of the rights discussed. At one point, Lord Judge CJ is careful to state that:

45(b) The present claims relate to products of a living human body intended for use by the persons whose bodies have generated them. In these appeals we are not invited to consider whether there is any significant difference between such claims and those in which products are intended for use by other persons ... .

And:

45(f)(v) In reaching our conclusion that the men had ownership of the sperm for the purposes of their present claims, we are fortified by the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the Trust's breach of duty, namely preclusion of its future use.

In short, the Court was careful not to engage with any theoretical or practical questions (relating to property and the human body) beyond the narrowly articulated facts of the case. While this is not uncommon in the slow evolution of the common law, many will not appreciate the lack of direction for future cases.



## ALTERNATE METAPHORS?

While the sheer weight and prevalence of property, combined here with the range of commercial interests operative in the biomedical setting, makes it difficult to avoid the property paradigm, the widespread concern over instrumentalisation and the potential negative consequences of propertisation should perhaps prompt us to inquire whether an alternative metaphor might have been deployed. It has been argued that (1) the foundation of the (legal) metaphor is the imagination, and (2) the use of metaphor in law as a naming vehicle requires that it be grounded in the relevant human condition (Murray, 1984). On the issue of imagination, note the following:

All human rights, laws, and ideals of society were philosophical and before that they were not even language and therefore not in existence. But somewhere, sometime, someone thought the idea and named the law. When the legal concept grew beyond its ideal stage and became public as part of the social psyche, it became a reality. It became the law. So, too, there are many new ways of living and socialising which have not yet become the law, and this is because they have not been imagined and language into existence. The imagination then is the creative source ... of metaphorisations (Murray, 1984, p. 723).

With respect to the ‘human condition’ in which the metaphor is properly grounded, one might consider the following: the need to promote, and the desire to experience/realise, justice, efficiency, democracy and human value in the face of quickly evolving biomedical knowledge and practices which increasingly threaten traditional views of social and economic propriety and human identity. Lord Judge CJ himself noted the ever-expanding frontiers of medical science and the need for the common law, including tort and contract law, to keep pace (paras. 3 and 45(a)).

Bearing these points in mind – the need for imagination and grounding in the social reality – one alternate approach may have been to give greater credence to the personal injury basis argued by the claimants. Obviously, such an approach is not without its difficulties, as pointed out by Lord Judge CJ, but a morally grounded principle and an intelligently structured and limited rule might have been fashioned using ‘personal injury’ as a metaphor.

By way of (very preliminary) consideration of such an approach, we might, at the outset, recognise the following matters:

- gametes (like sperm) have a very personal and unique biological origin and function;
- the gametes retained an ongoing function intended to be used if these claimants were rendered infertile;
- the claimants saw the sperm as an extension of their living being, and their natural inclination may have been to make claims such as, “I made or produced that sperm and it is a part of me”; and
- the claimants simply wanted control of that special product and an avenue for recovering damages where their interests had been negligently interfered with.

Bearing this in mind, the Court might have concluded that the sperm, being a unique product which originally formed a unity with the body and subsequently retained its function and purpose, remains personal and can be injured in certain limited circumstances such that damages are warranted. While there might be no general damages for pain and suffering at its loss (ie: destruction of the sperm would not cause pain or injury to the person), there might well be pecuniary losses and losses resulting from emotional trauma, again if such was foreseeable and the circumstances warrant. Ultimately, the need for limits and caveats should not necessarily be a bar to this approach. We have, for example, erected all manner of limiting rules around rights attending to the foetus (ie: foetuses have an expanding repertoire of rights as it comes closer to term, but can only vindicate them if it is born and living and duly represented).

Of course, the personal injury metaphor is not the only alternative metaphor. Scotland offers another non-property approach, one based on personality protection:

[R]ights of personality protect the non-patrimonial [non-economic] or dignitary aspects of the human person – who a person is rather than what a person has. The concept of rights of personality ... was ...unarticulated, in common law systems until very recently. (Whitty and Zimmermann, 2009, p. 3)

Traditionally, the ‘*actio injuriarum*’<sup>11</sup> was available for, *inter alia*, insults or affronts to honour and threats of harm, and was supported by broad understandings of dignity (or the desire for the law to promote respect for others’ dignity). And it is such a dignity-based action which might be used to protect interests such as those advanced by the claimants in *Yearworth* (ie: interests in having the life they set for themselves protected to some extent, and of having a means of recovery when that life and their dignity is infringed by the negligence of others).

This action was successfully deployed in *Stevens v Yorkhill NHS Trust and Another* (2007), wherein the parent ‘pursuer’<sup>12</sup> argued that, despite authorising a post-mortem on her daughter, it was never explained to her that such post-mortem entailed removing and retaining organs. Her discovery of this led to shock and psychiatric injury (ie: severe depression), and, ultimately, to loss of employment. She argued, *inter alia*, that there exists under Scots common law an action in its own right for wrongful interference with a body (in this case a corpse). On this point, the Court considered *Pollock v Workmen* (1900), *Conway v Dalziel* (1901), and *Hughes v Robertson* (1913), and noted that they were not superseded by the *Human Tissue Act 1961* or the *Human Anatomy Act 1984*. It stated:

43 It would appear ... that in addition to supporting the proposition that an unauthorised post-mortem can constitute an independent legal wrong, the case of *Hughes v Robertson* also lends some support to the line taken in *Conway v Dalziel* that the removal

<sup>11</sup> The term ‘*actio injuriarum*’, also appearing as ‘*actio iniuriarum*’, refers to a right of action for wrongful conduct resulting in an affront to honour and feelings (or personality), and which entitles the victim to claim damages. It is an old claim received into Scots law from Roman law many centuries ago. For more on this action, see MacQueen (2005) and Reid (2007).

<sup>12</sup> The term ‘pursuer’, in Scots law, refers to the party who initiates a lawsuit with the intent of obtaining a legal remedy, and it is the equivalent of ‘plaintiff’ or ‘claimant’ in other jurisdictions.

and retention of organs can itself constitute a separate and independent legal wrong.

And:

57 [T]he unauthorised post-mortems ... disclosed such an insensitivity to the feelings of their relatives ... that such conduct constituted an affront to their dignity as relatives of the deceased so as to justify being classed as a civil wrong ... .

The Court concluded by considering damages by way of '*solatium*'<sup>13</sup>:

62 In my opinion Scots law recognises as a legal wrong for which damages by way of *solatium* can be claimed the unauthorised removal and retention of organs from a dead body. The Scottish cases suggest that the true juridical basis for this type of claim lies in the *actio injuriarium*.

Ultimately, the Scottish Court acknowledged the existence of an independent action based on wrongful interference with (or treatment of) a body (and its parts), which action is based on an affront to human dignity (Whitty and Zimmermann, 2009). The pursuer need not engage with the property paradigm.

The question remains: What might or should dignity mean in this situation?

One must concede at the outset that the utility of dignity as a legal value has been questioned (Feldman, 1999), and it has been described as overly vague (Macklin, 2003, Harmon, 2006). Nonetheless, the value remains popular and widely claimed, readily understood (at least in general terms), and clearly of relevance to the treatment of human beings and their parts and products (eg: we all wish to generally protect and enhance human dignity, for ourselves and others, and to avoid instrumentalisation of the person and his/her parts which could be damaging). Moreover, its use is in conformity with the burgeoning body of international biolaw with respect to the position of the person and the body in the modern biomedical setting.<sup>14</sup>

While a more precise definition might be (and would need to be) fashioned, for present purposes, broadly construed, dignity might capture the idea that persons and their desires have value. It supports mid-level legal principles like autonomy (self-rule), privacy (shelter from oversight or interference), and personal identity (or the construction of a public persona), which are all reasonably well understood. Interestingly, one can already (arguably) detect a movement toward dignity-based actions in the negligence jurisprudence. For example, in *McFarlane v. Tayside Health Board* (2000), a wrongful pregnancy case, the court awarded a sum for the wrongful affront to the parent's autonomy. In *Rees v. Darlington Memorial Hospital NHS Trust* (2004), dignity was recognised as an important human right. In *Murray v.*

<sup>13</sup> The term '*solatium*' refers to claimable damages in a personal injury claim that are 'non-patrimonial', that is damages for emotional distress and/or pain and suffering experienced by the victim (as opposed to patrimonial damages, which include more readily quantifiable economic losses): see Scottish Law Commission (2008).

<sup>14</sup> In this regard, note the Universal Declaration of Human Rights (1948), the Biomedicine Convention (1997), the Universal Declaration on the Human Genome and Human Rights (1997), the Universal Declaration on Bioethics and Human Rights (2005), and others.

*Express Newspapers plc* (2008), the court referred to dignity in recognising parental rights to control the size of their family

Ultimately, then, if (originator) control is the interest to be protected, and if a remedy for its interference is the objective to be realised, then a non-property approach (or metaphor) reliant on negligence but grounded in dignity could be imagined. In the present circumstances, a dignity-based *actio injuriarum* might provide a remedy where, through another's negligence, one's life options are damaged (or limited) through harm to a functional body product that once formed a unity with the claimant. A Court need not turn to the property metaphor (ie: we need not rush into the arms of the property metaphor/maelstrom). With some imagination, alternate metaphors or approaches to control and justice can be articulated, and they might be more readily acceptable than property.

## CONCLUSION

What makes the *Yearworth* case significant? Quite simply, it constitutes the first instance that an appellate court has seriously considered the question of originator property in human material, and it has done so directly where previous courts have shied away from the issue. It has apparently cleared away a controversial piece of legal artifice, and extended the right of body-product ownership to originators of those products within a certain context/relationship, thereby opening up new remedial possibilities.

What detracts from *Yearworth's* significance? First and foremost, the decision is limited to very narrow circumstances (ie: the remedy is limited to persons who stored gametes for their own use and these gametes were damaged). However, more importantly, it is wanting on a number of fronts. *Yearworth* was ripe for an articulation of relationship, and a statement of law, as elegant as that offered by the revolutionary decision in *Donoghue v Stevenson* (1932),<sup>15</sup> but it did not offer them. Indeed, its lack of value-engagement, opaqueness around the work 'property' is supposed to perform, and its general absence of statements of general application relating to rights and duties, all combine to undermine its general significance.

Ultimately, one would have hoped for much more from the Court, particularly in light of:

- the (precarious) position of the person in modern medical practices (including biomedical research);
- the deep and widespread debate about the propriety of empowering the individual through the property paradigm;
- the values which must be vindicated in the human life and identity settings (including human dignity, autonomy, and equality); and

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<sup>15</sup> *Donoghue v Stevenson* (1932) was transformative of the common law. It was immediately recognised as a legal turning point with respect to its holding that individuals have duties toward persons whom they will never meet but might foresee as being injured by their actions (Pollock, 1933). Fifty years post-decision, it was viewed as the "single most important decision in the history of the law of torts" (Linden, 1983), and the "most important decision in all the common law" (Smith and Burns, 1983). Sixty years post-decision, it was still described as "revolutionary", having reshaped the law of product liability and torts (Ferrari, 1994).

- the possibility of securing rights of control and remedies through other means (as has been done in Scotland).

In the result, we are left with more questions than answers. While it engages with, and impacts on, important theoretical and practical issues – from legal, healthcare and research perspectives – the guidance it offers is minimalist and patchy, and, for that reason, its precedential significance is in doubt.

In the end, we are left to wonder at the potential significance of *Yearworth*. It may well be both a ‘first step’ and a ‘next step’ in the advance of the property paradigm: a ‘first step’ in that it finally extends rights to originators of (at least) products, and a ‘next step’ in that it is one more in a long line of cases which chips away at the ‘no-property in the human body’ rule. The scope of the holding will have to be tested in future cases where non-reproductive tissue is in question and different relationships obtain. If it *has* opened the door for tissue originators in a broader way, *Yearworth* may found a new line of cases which will, hopefully, engage more fully with the conceptual and ethical elements of the relationships and transactions at issue. If this is the case, one might characterise it as transformative of the common law in a slow burning sort of way.<sup>16</sup> Time will tell.

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<sup>16</sup> For an imaginative and activist judge, the *Yearworth* decision would perhaps suffice as a launch pad for articulating the general justice requirements with respect to living bodies and originators of parts, tissue and products, but it is a hope reliant on future cases and judges.

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